JD(NY)–43–05
Albany, NY
Trenton, NJ
Newark, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

HORIZON GROUP OF NEW ENGLAND

and **Case Nos.: 22-CA-26318**
22-CA-26441

SOUTHERN NEW JERSEY LABORERS DISTRICT COUNCIL

and

LABORERS LOCAL UNION NO. 1153

***Brian Monroe, Esq.,* Newark, New Jersey, for the General Counsel.**
***Steven Weinstein, Esq.,* (Becker Meisel, LLC,)**
Livingston, New Jersey, for the Respondent.
***Michael Scaraggi, Esq.,* West Caldwell, New Jersey**
for the Charging Party Local 1153.

DECISION

Statement of the Case

Steven Fish, Administrative Law Judge. Pursuant to charges filed by Southern New Jersey Laborers District Council herein called the District Council and by Laborers Local Union No. 1153, herein called Local 1153, and collectively called the Union, the Director for Region 22 issued an Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing, on September 30, 2004, alleging that Horizon Group of New England, herein called Respondent has violated Section 8(a)(1) and (5) of the Act, by failing to apply the terms and conditions of its collective bargaining agreement with the Union, to jobsites in Trenton and Newark, New Jersey.

The trial with respect to the allegations in said complaint was held before me in Newark, New Jersey on March 2, 2005. Briefs have been filed by the General Counsel and the Respondent, and have been carefully considered.

Based upon the entire record, including my observations of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation with its primary office and place of business in Albany, New York, has been engaged as a contractor in the construction industry providing labor

and demolition services at various work sites throughout New Jersey, including work sites in Trenton and Newark, New Jersey. During the preceding 12 months from the date of the Complaint, Respondent performed services valued in excess of $50,000 in states other than the state of New Jersey. It is admitted and I so find that all times material herein Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I so find that the District Council and Local 1153 are and have been labor organizations within the meaning of Section 2(5) of the Act.

II. Facts

Respondent as noted performs commercial construction at various job sites, with its main office in Albany, New York. Its co-presidents and only officers are Dean Robbins and Michael Dawson.

Doug Robbins is the brother of Dean Robbins. Doug Robbins is a Project Manager for Respondent and has been employed in that position for 4 years. He was the Project Manager on 10-11 projects, which ranged in cost from $100,000 to 6.7 million dollars. As Project Manager, Robbins sets up the project, hires subcontractors, hires employees, signs subcontractor agreements, buys materials, signs invoices, and represents Respondent at meetings. Various individuals employed by Respondent on the job, such as Head Superintendent and Foreman report to Doug Robbins as Project Manager. Doug Robbins sends daily reports to Respondent's main office in Albany, New York generally to his brother. In that fashion Dean Robbins monitors the projects of Respondent. The owners of Respondent Dean Robbins and Dawson, are rarely present on Respondent's projects, so that the Project Manager is the face of Respondent at the projects that he is in charge of.

In that regard, testimony was adduced from Doug Robbins as well as Dawson, that the Project Managers including Doug Robbins, have authority only with regard to the particular project that they are working on, and have no authority to execute any document that seeks to bind Respondent beyond that project, including collective bargaining agreements. Further Doug Robbins testified that documents that he does sign on behalf of Respondent, such as subcontractor agreements, must be approved by Respondent's officials in Albany, prior to Doug Robbins signing the document.

In July of 2003, Respondent was the successful bidder on a project involving renovation work on three schools in Burlington, New Jersey. The project was funded by the New Jersey School Construction Company (NJSCC), a subdivision of New Jersey Economic Development Authority.

Because the project exceeded five million dollars, it was covered by the Project Labor Agreement (PLA) negotiated between NJSCC and various Trades Unions, including the Laborers Union. The PLA required that the contractor use labor on the project referred by the various unions, and to be bound by the various collective bargaining agreements, including benefit fund contributions, for work performed on the project.

During the bidding process, Respondent was made aware that the project was covered by the PLA, and that by entering into a contract for the project, it would be bound by the provisions of the PLA. The PLA itself, which was signed by the NJSCC and representatives from the various unions, also included as attachments, the collective bargaining agreements between the unions and various associations, that the contractors on the job would be required to follow while performing work on the project. The PLA also contains in Section 4, a

"Supremacy Clause", which reads as follows:

> This Agreement, together with the local Collective Bargaining Agreements appended hereto as Schedule A represents the complete understanding of all signatories and supersedes any national agreement, local agreement or other collective bargaining agreement of any type which would otherwise apply to this Project, in whole or in part. Where a subject covered by the provisions, explicit or implicit, of this Agreement is also covered by a Schedule A, the provisions of this Agreement shall prevail. It is further understood that neither the PMF nor any Contractor shall be required to sign any other agreement as a condition of performing work on this Project. No practice, understanding or agreement between a Contractor and Local Union, which is not explicitly set forth in this Agreement shall be binding on this Project unless endorsed in writing by the PMF.

The project was valued at $6.7 million Respondent performed approximately 10% of the labor with its employees. The remainder of the work was subcontracted out by Respondent to various contractors, whose employees were also subject to PLA. Respondent did not have a collective bargaining agreement with any labor organization, and none of its employees were represented by any union. Respondent had a workforce of its own employees of approximately 15-20 employees.

Respondent commenced work on the job on or about July 7, 2003. It began performing demolition work with its own employees. Doug Robbins testified that this job was his first experience with a labor union or a PLA. He claims that he was under the impression that the PLA allows Respondent to use 5% of its own employees for each trade. However, it does not appear that the PLA provides any such exception, and Respondent has not so shown.

On July 23, 2003, a meeting was held at I.B.E.W. hall in Trenton, New Jersey. Present were representatives from all the building trades unions, representatives from the NJSCC and Doug Robbins. An official from the NJSCC announced that Respondent was the successful bidder on the Burlington job and introduced Robbins as the "key person" for Respondent on the job. The union representatives were told that if any questions arise on the job, Robbins should be contacted.

Robbins gave a brief description of the scope of the work on the job and types of trades that would be utilized. After Robbins completed his presentation, a number of Business Agents approached Robbins, including Carl Styles of the District Council, gave Robbins their business cards, and asked Robbins to call them if he needed workers.

Morris Rubino, President of the Building Trades Council, spoke and stated that the project was covered by the PLA, and added that the contractors do not have to sign individual contracts with any union. However, Rubino added that the unions can approach any contractor, "but they do not have to sign." Rubino also went over the terms of the PLA at the meeting.

Robbins testified that he expected, based on conversations with representatives from the NJSCC to be asked to sign the PLA at the meeting, but that did not happen. Robbins further testified that after the meeting he discussed the issue with these representatives, as well as his brother, and was told "don't worry about it." In fact it is not clear whether Respondent ever actually signed the PLA. However, Robbins concedes that he was aware based on the

bidding process, that Respondent was obligated to the PLA and to use union labor on the project.

On August 5, 2003, Carl Styles, accompanies by Leon Jones, a Business Agent for the Bricklayers Union visited the Burlington jobsite and met with Doug Robbins in the jobsite trailer. Styles introduced himself to Robbins again,[1] and informed Robbins that he noticed that Respondent was performing demolition work, that is within the Laborer's Union jurisdiction. Therefore, Styles wanted to put some of his men to work. Robbins replied that he was more than happy to hire some of Styles's people, since he knew that Respondent was bound by the PLA. Styles asked how many workers Respondent would need? Robbins answered "From 8-10 workers." Styles then handed Robbins a copy of a document entitled "Short Form Agreement", plus a copy of the Union's collective bargaining agreement with the Building Site and Construction Contractors and Employers Association. Robbins asked Styles what these documents were for. Styles replied "That in order for Respondent to get men to work, Robbins needed to sign the Short Form Agreement." Robbins read the Short Form Agreement and asked if it was part of the PLA? Styles answered "That it was part of the PLA." Robbins read it again and appeared to be skeptical of Styles' description of the document, since it made no reference to the PLA. The document reads as follows:

> The undersigned Employer, desiring to employ laborers from the New Jersey Building Laborer Local Unions and District Councils affiliated with the Laborers' International Union of North America, hereinafter the "Union," and being further desirous of building, developing and maintaining a harmonious working relationship between the undersigned Employer and the said Unions in which the rights of both parties are recognized and respected, and the work accomplished with the efficiency, economy and quality that is necessary in order to expand the work opportunities of both parties, and the Unions desiring to fulfill the undersigned Employer's requirements for construction craft laborers, the undersigned Employer and Unions hereby agree to be bound by the terms and conditions as set forth in the 2002-07 Building, Site and General Construction Agreement, which Agreement is Incorporated herein as it set forth in full.

Styles then stated if Respondent didn't sign the Agreement, it would not receive any men from the Union, and the Union would cause trouble for Respondent on the job with the school district and the NJSCC, because Respondent is not abiding by the PLA. Robbins told Styles to "Leave your package on the table and I'll get back to you." Styles left the Short Form Agreement and the contract on the table and left the trailer.

The next day, August 6, 2003, Styles received a phone call from his Manager, Kurt Jenkins. Jenkins informed Styles that the Union had received a signed copy of the Short Form Agreement from Respondent by FAX. The Agreement was signed by Doug Robbins, and dated August 5, 2003. Styles signed a copy of the Agreement on August 6, 2003, but did not send a copy with his signature on it to Respondent.

My findings with respect to events of August 5 and 6 is based on a compilation of what I believe to be the credible portions of the testimony of Doug Robbins, Styles and Jones. While

[1] Styles had previously met and gave Robbins his card at the July 23, 2003 meeting.

Styles and Jones testified that the conversation between Styles and Robbins lasted from 5-10 minutes, the only portions that they recalled was Robbins instructing Styles to leave the package on the table. Jones conceded that there may have been more to the conversation than he recounted. I therefore conclude that there was more to the conversation then testified to by Styles and Jones, and I credit Robbins as detailed above that Styles told him that the Short Form Agreement was part of the PLA, and threatened to withhold workers from Respondent and to cause trouble for Respondent on the job with the District and NJSCC, if Respondent did not sign.

However, I credit Styles and Jones, that Robbins did not sign the Short Form Agreement on August 5, but instead faxed a copy to the Union the next day. I note that Styles was corroborated by Jones as to this testimony. Further based on the testimony of Robbins as well as Dawson, concerning Robbins' limited authority, I find it unlikely that he would sign anything on behalf of Respondent involving union's without approval from one of the officers, i.e. his brother or Dawson. I note particularly that Doug Robbins testified that he had no previous experience dealing with unions on any of the previous jobs, where he served as project manager. This fact makes it more likely that he would consult with his superiors, before signing any documents on behalf of Respondent with the Union. I conclude therefore, as related above that the Union received a signed copy of the Short Form Agreement by FAX on August 6, 2003, which was signed by Robbins on August 5, after he consulted with his brother. I also do not credit Doug Robbins' testimony that Styles informed him that the Short Form Agreement was only a one job agreement. I credit Styles' testimony that he had no authority to sign one job agreements. I also rely upon the testimony of Respondent's own witness, Michael Dawson. He testified that he spoke to Dean Robbins about the issue and was told as follows:

> My conversation with Dean was exactly that Doug was looking to put Laborers on the project, was told by Mr. Styles that if he didn't sign the agreement he would not bring the Laborers to the project and we would be in default of the PLA, which was there. So Doug signed this agreement under coercion or fear that he couldn't do the project. This is what I understand.

Notably Dawson did not mention anything about Respondent being informed, or believing that the Short Form Agreement was a one job agreement, when it signed, but only that Robbins signed under "coercion or fear that he couldn't do the project." I find therefore, that Doug Robbins consulted his brother Dean. Dean after reading the documents, which are clear on their face, was aware that Respondent was signing a contract with the Union, covering more than the Burlington jobsite. However, because of the threat that the Union would not send any men and to cause trouble for Respondent, Robbins decided not to jeopardize a $6.7 million dollar contract, and agreed to sign.

I also rely on Respondent's subsequent conduct, to be discussed more fully below, when it attempted to terminate the contract, when it finished with the Laborers' work at the project. Thus if Respondent truly believed that it had signed a one job agreement, there would be no need to terminate the agreement with the Union.

Finally, I also rely on the failure of Respondent to call Dean Robbins as a witness. Doug Robbins admitted that he discussed the matter with his brother, and sent him a copy of the Short Form Agreement that he signed. I find that Respondent's failure to call Dean Robbins to testify permits an adverse inference, which I draw that his testimony would have been unfavorable to Respondent concerning these issues. *Wild Oats Markets,* 344 NLRB #86, ALJD Slip op. p. 31 (2005); *Meyers Transport,* 338 NLRB 958, 972 (2003); *United Parcel Service,* 321

NLRB 300, 308-309 fn. 1 (1996); *International Automated Machines,* 285 NLRB 1122, 1123 (1987).

The collective bargaining agreement that is referred to in the Short Form Agreement, which I have found was provided to Robbins by Styles on August 5, 2003 sets forth recognition and territorial jurisdiction clauses, as follows:

> The Employer recognizes that the Building and Construction District Councils and Local Unions bound hereby represent a majority of employees of the Employer doing laborer's work and shall be the sole bargaining representatives with the Employer for all employees employed by the Employer engaged in all work of any description set forth under Article II, Section 2.10, Work Jurisdiction, below. The District Councils and Laborer Local Unions hereby are: Northern New Jersey Building Laborers District Council (Locals 592, 325 and 1153); Central New Jersey Building Laborers District Council (Locals 394, 593 and 1030) and the Southern New Jersey Building Laborers District Council (Locals 222, 415 and 595).

Article II: "Work and Territorial Jurisdiction" Section 2.30 Territorial Jurisdiction, in part reads:

> This Agreement is effective and binding on all jobs in the State of New Jersey upon execution of the same by the Employer and any building and construction laborer local union bound hereby....

Furthermore, Article 1, Section 1.30, entitled "Scope of Agreement", reads as follows:

> The relationship of the parties is fully and exclusively set forth by this Agreement and by no other means, oral or written.

The Agreement also provided in bold face;

> **Note: This Agreement may not be limited to a Job Only Agreement without the written approval of the District Council Business Manager.**

From approximately August 7, 2003 to September of 2003, Respondent employed Laborers at the Burlington job site.[2] On September 12, 2003, Doug Robbins faxed the Union a letter of termination. According to Doug Robbins, prior to drafting the letter, he was told by one of his fellow project managers that he should have somebody look at whatever information they had in the office to see if there is anything there to get Respondent out of the agreement or whatever he signed.

"RE: Terminating Labor Agreement"

[2] During this period of time, Respondent complied with all the terms of the collective bargaining agreement with respect to its employees working on the project.

> Horizon Group would like to thank you for supplying us with manpower for the Burlington City Schools-NJSCC project. It was most helpful in getting the work completed on time. Due to the fact we won't need any more laborers and hereby terminate contract as per Article XXIII: Agreement & Termination 23.10.
>
> Once again thank you for your cooperation and help on this project."

The Termination Section referred to by Respondent in its letter, Section 23.10 of the collective provides:

Article XXIII: Agreement and Termination

> **23.10 Effective Date and Termination**
> This Agreement shall become effective on the 1st day of May 2002, or the date signed, whichever is later, and shall terminate at midnight, April 30, 2007. It is mutually agreed, however, that if any Employer signatory to this Agreement desires to reopen negotiations for a new Agreement to take effect upon the termination of this Agreement that such Employer shall give written notice to the Laborers' International Union of North America, Eastern Region office, of such intention ninety (90) days prior to the termination of this Agreement, otherwise this Agreement is to continue in full force and effect after the termination date of this Agreement from year-to-year, until written notice is given of a desire to reopen negations. In order for this Agreement to be terminated after the aforesaid termination date, the Employer shall give written notice at least thirty (30) days prior to April 30th of each succeeding year and, if said thirty (30) days notice is given, the Agreement shall terminate on April 30th of the year following the giving of such notice. In the case of such continuation, the Employer agrees to be bound by the wage and benefit rate schedules of any new Agreement made by the Union and the Building Contractors Association of New Jersey.

The Union did not send a response to Respondent's letter. Although the "laborers" work that Respondent was performing at the site was completed in September of 2003, other aspects of the project and work by subcontractors continued for many months.

In January of 2004, Respondent began performing the work at the Columbus School in Trenton, New Jersey. This project was not covered by NJSCC PLA. However, the Laborers' Union made a demand that Respondent comply with the Laborers' contract, based upon the Short Form Agreement that Respondent signed in August of 2003. Respondent did not comply with the demand, and did not apply the contract to the work on that project. Instead, Doug Robbins called Styles on the phone in early January of 2004. Robbins asked Styles to do him a favor and call the Local Union in Trenton and tell them that the document that Respondent had signed was for the Burlington's site only, and "get them off our backs." Styles replied that the Agreement signed by Respondent was a full blown Labor Agreement covering Laborers throughout the State of New Jersey. Styles added that he does not have the power to sign a contractor to a one job agreement. Styles received another call from someone else from Respondent, whose name Styles could not recall. This individual made a similar request of

Styles, to do him a favor and tell Styles' people in Trenton that Respondent signed a one job agreement. Again Styles replied that Respondent had signed a full blown agreement with the Union and he did not have the authority to sign a one job agreement.

In June of 2004, Respondent obtained another contract to perform work at the First Avenue School in Newark, New Jersey. Local 1153 demanded arbitration under the Laborers contract, claiming that Respondent had violated the contract by performing work "non-union" and subcontracting work to a non-signatory contractor. Subsequently, the instant charges were filed. Thus it does not appear that the arbitration demand went any further. Apparently, the Union decided to proceed with the Board charge, and made no further attempts to pursue its case through the arbitration process.

III Analysis

There can be no dispute that Respondent executed the Short Form Agreement dated August 5, 2003, which by its terms, expressly bound Respondent to the terms of a collective bargaining agreement, which obligated Respondent to apply the terms of said contract to all jobs of Respondent in the state of New Jersey. It is also undisputed, that subsequent to the signing, and still during the term of the Agreement, Respondent performed work on jobs in Trenton and Newark, New Jersey and failed to apply the terms of the contract to the laborers' work performed on these projects.

The complaint alleges and General Counsel contends that Respondent's failure to do so, violated Section 8(a)(1) and (5) of the Act.

Respondent disagrees and has raised various defenses to the complaint allegations. Initially, Respondent contends that Doug Robbins who executed the Short Form Agreement on behalf of Respondent, had no authority to bind Respondent to any collective bargaining agreement, outside of the project that he was responsible for monitoring, i.e, the Burlington project. *International Operating Engineers, Local 250, (Home Building Contractors),* 268 NLRB 256, 258 (1967). (Foreman did not have implied authority to bind Employer to collective bargaining agreement for two years within broad geographical area).

The applicable law with respect to agency and implied authority was summed up by the 5th Circuit Court of Appeals.

> As to agency, section 2(13) of the NLRA provides that "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. § 152(13). An employer's responsibility for the acts of an agent is determined in accordance with the ordinary common law rules of agency. *See Overnite Transp. Co. v. NLRB,* 140 F.3d 259, 265-66 (D.C. Cir. 1998). One of the primary indicia of agency is the apparent authority of the employee to act on behalf of the principal. *See id., quoting* Reinstatement (Second) of Agency § 27 (1992) ("'Apparent authority' exists where the principal engages in conduct that 'reasonably interpreted, causes the person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.'"). Stated otherwise, "[a] party claiming apparent authority of an

> agent must prove (1) that the acting party subjectively believed that the agent had authority to act for the principal and (2) that the subjective belief in the agent's authority was objectively reasonable." *Meyers v. Bennett Law Offices,* 228 F.3d 1068, 1073 n. 2 (9th Cir. 2001).

Poly-America Inc. v. NLRB, 260 F.3d 465, 480 (5th Cir. 2001); *Accord Zimmerman Plumbing,* 325 NLRB 106 (1997); *Great American Products,* 312 NLRB 962, 963 (1993).

Applying these principles to the instant case, it is clear that Respondent clothed Doug Robbins with apparent authority to execute the collective bargaining agreement with the Union, that the Union believed that Robbins had the authority to act for Respondent, and that belief was objectionively reasonable. In that regard, Doug Robbins represented Respondent at the Building Trade meetings and was introduced as Respondent's chief spokesperson on the project. Robbins signed invoices, and subcontracting agreements on behalf of Respondent and was otherwise in charge of the project. It was therefore reasonable for the Union to believe that Robbins was authorized to act for Respondent by signing the Short Form Agreement.

While Respondent introduced evidence that Doug Robbins' authority was limited to activities involving only the particular project he was in charge of, that limitation was never made known to the Union. Doug Robbins did not tell the Union that his authority was limited in any way, and there were no facts, unlike in *Local 520 Engineers,* [3] that would have put the Union on notice of such a limitation. See, *Safeway Steel Products,* 333 NLRB 394, 400 (2001) (Negotiator never informed Union that his authority was limited.)

Furthermore, I have found above, that in fact, when Doug Robbins signed the Short Form Agreement, he had received approval from his brother Dean a co-owner of Respondent, to execute the Agreement. Such express approval obviously is sufficient to overcome any lack of authority by Doug Robbins to bind Respondent to the Agreement. *Safeway Steel, supra.*

Additionally, even absent my finding of express approval by Dean Robbins, it is undisputed that Dean Robbins was aware that Doug Robbins had signed the Agreement, and did nothing to disavow on it or to indicate to the Union that Doug was not authorized to execute the document. *Opportunity Homes Inc.,* 315 NLRB 1210, 1217 (1994) (Board of Directors never notified the Union that the Administrator did not have the authority to recognize the Union); *Pentech Corp.,* 294 NLRB 924, 926 (1989) (Failure of Employer to disavow conduct of alleged agent.)

Accordingly based on the foregoing, I conclude that Doug Robbins had both the express and implied authority to execute the Short Form Agreement with the Union on behalf of Respondent. *Safeway Steel, supra; Zimmerman Plumbing, supra; Opportunity Homes, supra; Great American Products, supra.*

Respondent also argues that General Counsel failed to provide any evidence that an

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[3] In *Local 520 Engineers,* the foreman involved was dressed in working clothes, unlike Robbins here. Further the foreman told the Union that he could not hire without authorization from the home office. Thus since the Union had been so informed, the Board concluded that the Union had no reason to assume that the foreman had sufficient authority to sign a collective bargaining agreement. Here Robbins made no such comments to the Union, indicating his limited authority.

appropriate unit existed or that the Union represented a majority of employees at any time. With respect to the unit, although the Short Form Agreement does not mention the unit, it does make reference to the 2002-7 Building Site and General Construction Agreement, which Agreement "is incorporated herein as if set forth in full." That collective bargaining agreement with the Laborers' District Council and its various affiliate locals, sets forth the unit as employees performing laborers' work as defined in the contract, "on all jobs in the State of New Jersey."

Such a unit which had been agreed to by the parties, by virtue of Respondent having signed the Short Form Agreement, is presumptively appropriate, and no evidence was presented that such a unit is inappropriate. I therefore find that the unit in the contract is appropriate. *Gem Management Co.,* 339 NLRB 489, 502 (2003) (Unit of all jobsites in certain counties of Michigan); *National Roof Systems,* 305 NLRB 965, 970 fn.11 (1991).

While Respondent is correct that the General Counsel has not established that the Union has at any time represented a majority of its employees, such a finding is of no help to Respondent. The complaint alleges a "limited" 9(a) relationship between Respondent and the Unions, which does not require majority status, since Respondent is admittedly an employer in the construction industry. In, *John Deklewa & Sons,* 282 NLRB 1375 (1987), *enfd. sub. nom.* 843 F.3d 770 (3rd Cir. 1988) cert. denied, 488 U.S. 889, 109 S. Ct. 222 (1988) the Board recognized that pre-hire authorized agreements under section 8(f) of the Act, executed by Employers in the construction industry, are lawful regardless of majority status. When an Employer signs such an agreement, the Employer violates Section 8(a) (1) and (5) of the Act by failing to adhere to or by repudiating such agreements during its term. *Gem Management, supra* at 501; *Cedar Valley Corp.,* 302 NLRB 823 (1991); *National Roof Systems, supra* at 970; *Mesa-Verde Construction Co. v. Laborers*, 861 F.2d 1124, 1136 (9th Cir. 1988).

I therefore reject Respondent's contention that the lack of proof of majority status of the Union, provides a defense to Respondent's conduct.

Respondent's primary defense to its obligation to adhere to the Laborers' contract, is that it was procured by "fraud in the execution." *Conners v. Fawn Mining Corp.,* 30 F.3d 483 (3rd Cir. 1994); *Operating Engineers Pension Trust v. Gilliam,* 737 F.2d 1501 (9th Cir. 1984). These Circuit Court cases do differentiate between fraud in the execution and fraud in the inducement, and did allow parties to collective bargaining agreements to argue that the contract is void and unenforceable where the employer signs a document materially or radically different from the document that he believed he was signing, due to fraudulent statements by the Union. *Fawn Mining, supra.* (Union told Employer that the one page signature document that it signed, would be attached to collective bargaining agreement, which did not require employer to pay into benefit funds), *Gilliam, supra.* (Union told Employer that he was signing an application to become a member of the Union as an owner-operator, rather than Short Form Agreement).

While both of these cases did involve collective bargaining agreements, neither of them involved NLRB cases, and are inconsistent with NLRB law.

It is thus well settled under Board law, supported by the Courts, that where the contractual provisions are unambiguous, parol evidence is inadmissible to vary the terms of such an agreement. *Quality Building Contractors,* 342 NLRB No. 38 Slip op. p. 2-3 (2004); *America Piles,* 333 NLRB 1118, 1119 (2001); *NDK Corp.,* 278 NLRB 1035 (1986); *NLRB v. Local 11 Electrical Workers,* 772 F.2d 571, 575 (9th Cir. 1985).

Here the document signed by Respondent is clear and unambiguous, and parol evidence may not be permitted to vary its terms. Thus even if the testimony of Doug Robbins

was credited that he was told that he was signing a one job agreement by Styles, this would not provide a defense to Respondent. *Quality Building, supra; American Piles, supra.* I did find however that Styles did misrepresent to Robbins that the document that he was signing on behalf of Respondent was part of the PLA, when it was not, but for the same reasons, and based on the same precedent, this statement cannot be used to vary the terms of the unambiguous agreement that Respondent signed. Therefore, the parol evidence rule precludes Respondent's defense based on any alleged fraud in the execution.

Furthermore, whatever may be said about the difference between fraud in the execution and fraud in the inducement, I find that even under the Court cases cited by Respondent, neither are present here. Both fraud in the execution and fraud in the inducement, require a finding that the Employer was in fact misled about what was being signed, and that the Employer relied on that misrepresentation when signing the document. That is not the situation here.

I have found that whatever alleged misrepresentations were made by the Union, Respondent signed the Short Form Agreement, not for these reasons, but because the Union threatened not to send it any men and threatened to make "trouble" for Respondent, if it did not sign. This finding is based upon Dawson's admission that Dean Robbins told him the reason why Respondent signed, as well as the absence of any testimony from Dean Robbins. The failure to call Dean Robbins to testify, gives rise to an adverse inference that his testimony would be adverse to Respondent on this issue. *Wild Oats, supra; International Automated Machines, supra.*

Further support for this conclusion is found in Respondent's own conduct of attempting to terminate the contract in September of 2003. If Respondent truly believed that it had only obligated itself to a one-job agreement, there would be no reason to attempt to terminate the agreement, when the Laborers' work ended on the job.

The above evidence leads me to conclude which I do, that Respondent having read the Short Form Agreement, knew full well, when it signed, that it obligated Respondent to apply the contract to all jobs in New Jersey. However, in order not to jeopardize a $6.7 million dollar contract, by virtue of the Union's threat to cause trouble on the job for it, if it did not sign, Respondent decided to sign, and then attempt to terminate the contract when the Laborers' portion of the job was complete. Clearly the attempt to terminate is ineffectual, since the section of the contract cited by Respondent does not allow termination in September of 2003.

Accordingly, based on the foregoing analysis and precedent, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in the complaint.

Conclusions of Law

1. The Respondent, Horizon Group of New England, Albany, N.Y. is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Southern New Jersey Laborers District Council and Laborers Local Union No. 1153, and collectively called the Union, are labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to adhere to or apply the terms of conditions of the 2002-2007 collective bargaining agreement to its jobsites in Newark or Trenton, New Jersey, Respondent has repudiated its collective bargaining agreement with the Union and has engaged in unfair labor

practices in violation of Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action to effectuate the purposes and policies of the Act.

I shall recommend that Respondent be ordered to honor the terms of the collective bargaining agreement that it executed with the Union, including offering employment to applicants, who would have been referred by the Union were it not for Respondent's conduct, *AEi2, LLC,* 343 NLRB #56 Slip op. p.1 (2004); *J.E. Brown Electric,* 315 NLRB 620 (1994), make whole such applicants for any loss of earnings or benefits suffered by the Respondent's failure to hire them. Backpay is to be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). In-statement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding. *AEi2, LLC, supra.*

Additionally, I shall recommend that Respondent be ordered to reimburse unit employees at the Trenton and Newark jobsites for any losses of wages and benefits, including payments to the Union's benefit funds, in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970); *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn.7 (1979), and *Kraft Plumbing & Heating,* 252 NLRB 891 fn.2 (1980) *enfd.* 661 F.2d 940 (9th Cir. 1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [4]

ORDER

The Respondent, Horizons Group of New England, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating the 2002-2007 collective bargaining agreement that it executed with Building Laborers' District Council and Local Unions of the State of New Jersey (the Union).

(b) Failing to adhere to the terms and provision of the 2002-2007 collective bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Honor the terms of the 2002-2007 contract with the Union during the term of the agreement and any automatic renewal or extension of it, including by paying contractually required wages and fringe benefits.

(b) Make whole, with interest, the unit employees for any loss of wages and other benefits they may have suffered as a result of Respondent's failure to adhere to the terms of the collective and bargaining agreement, as set forth in the remedy section of this decision.

(c) Offer immediate and full employment to those applicants who would have been referred by the Union to Respondent for employment at its Trenton and Newark, New Jersey jobsites, were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by the Respondent's failure to hire them, plus interest as set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and other payments due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its current jobsites within the geographical area encompassed by the appropriate unit herein and at its facility in Albany, New York, Newark and Trenton New Jersey jobsites, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Steven Fish
Administrative Law Judge

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT repudiate the terms and conditions of our collective-bargaining agreement with Building Laborers' District Council and Local Unions of the State of New Jersey (the Union) AFL-CIO during the term of the agreement.

WE WILL NOT fail and refuse to recognize and abide by the terms of that agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor the terms of the 2002-2007 collective bargaining agreement with the Union during the term of the agreement and any automatic renewal or extension of it, including paying contractually required wages and fringe benefits.

WE WILL make whole, with interest, all bargaining unit employees for any loss of wages and other benefits they may have suffered as a result of our failure to adhere to the terms of the collective bargaining agreement.

WE WILL offer immediate and full employment to those applicants who would have been referred by the Union to us for employment at our Trenton and Newark, New Jersey jobsites, were it not for our unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by failure to hire them plus interest.

HORIZON GROUP OF NEW ENGLAND

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor
Newark, New Jersey 07102-3110
Hours: 8:30 a.m. to 5 p.m.
973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.